(1)

Supreme Court, U.S.
FILED

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No. [redacted]

IN THE
Supreme Court of the United States

HOHENBERG BROS. COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari
To The U.S. Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

PETER BUCK FELLER
Counsel of Record
DANIEL G. JARCHO
JOSEPH F. DENNIN

MCKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioners

98 PP

QUESTION PRESENTED

Whether a taxpayer is entitled to interest on a refund of unconstitutional Harbor Maintenance Tax that the government assessed in violation of the Constitution's Export Clause.

LIST OF PARTIES

All parties do not appear in the caption on the cover page. The following is a list of all parties to the proceeding in the court of appeals (all of which are parties to this petition):

Petitioners

Hohenberg Bros. Company

A.C. Monk and Company, Inc.

The Austin Tobacco Company, Inc.

Cargill Americas, Inc.

Cargill Citro-America, Inc.

Cargill Fertilizer, Inc.

Cargill, Incorporated

Carolina Leaf Tobacco Company, Inc.

Dibrell Brothers, Inc.

Excel Corporation

General Electric Company

K.R. Edwards Leaf Tobacco Company, Inc.

Maclin-Zimmer-McGill Tobacco Co., Inc.

Monk-Austin International, Inc.

Thorpe-Greenville Export Tobacco Co., Inc.

T.S. Ragsdale Company, Inc.

Universal Leaf Tobacco Company, Inc.

U.S. Steel International, Inc.

U.S. Steel Mining Co., Inc.

USX Corporation

USX Engineers & Consultants, Inc.

BASF Corporation

BASF Magnetics Corporation

Akzo Nobel Chemicals, Inc.

Reynolds Metals Company

Zeneca Inc.

ISK Biosciences Corporation

Archer-Daniels-Midland Company

ADM/Growmark River Systems, Inc.

Valley Grain Products, Inc.

The Coleman Company

Hill's Pet Nutrition, Inc.

Standard Commercial Tobacco Company, Inc.

Carolina Trading Corporation

James I. Miller Tobacco Co., Inc.

PMA Incorporated

The Tobacco Trading Corporation

W.A. Adams Company

American Honda Motor Co., Inc.

Honda Trading America Corporation

BP Chemicals, Inc.

CBS Corporation

Continental Grain Company

ContiQuincy Bunge L.L.C.

Tacoma Export Marketing Company

Farmland Industries, Inc.

Farmland Foods, Inc.

Farmland Hydro, L.P.

Tradigrain, Inc.

Tradigrain S.A., Geneva

Lexmark International, Inc.

McDonnell Douglas Corporation

Monsanto Company

Solar Turbines Incorporated

ECC International, Inc.

ECCA Calcium Products, Inc.

Koch Carbon, Inc.

Koch Refining Company

Olin Corporation

Physics International Company

Sterling Chemicals, Inc.

IMC Global Operations, Inc.

IMC-Agrico Company

International Multifoods Corporation

Respondent

United States of America

RULE 29.6 DISCLOSURE

Petitioner Cargill, Incorporated has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock. Petitioner Cargill, Incorporated is the parent corporation of, or owns 10 percent or more of the stock of, the following other Petitioners: Hohenberg Bros. Company, Cargill Americas, Inc., Cargill Citro-America, Inc., Cargill Fertilizer, Inc., and Excel Corporation.

Universal Leaf Tobacco Company is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: K.R. Edwards Leaf Tobacco Company, Inc., Maclin-Zimmer-McGill Tobacco Co., Inc., Thorpe-Greenville Export Tobacco Co., Inc., and Universal Leaf Tobacco Company, Inc.

Dimon Incorporated is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: A.C. Monk and Company, Inc., The Austin Tobacco Company, Inc., Carolina Leaf Tobacco Company, Inc., Dibrell Brothers, Inc., Monk-Austin International, Inc., and T.S. Ragsdale Company, Inc.

United States Steel, LLC is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: U.S. Steel International, Inc., U.S. Steel Mining Co., Inc., USX Corporation, and USX Engineers & Consultants, Inc.

BASF AG is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner BASF Corporation.

Petitioner BASF Corporation is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner BASF Magnetics Corporation.

Akzo Nobel Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Akzo Nobel Chemicals, Inc.

Alcoa, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Reynolds Metals Company.

Zeneca Holdings, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Zeneca Inc.

GB Biosciences Holdings Inc. and Syngenta AG are the parent corporations of, or own 10 percent or more of the stock of, Petitioner ISK Biosciences Corporation.

Petitioner Archer-Daniels-Midland Company has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock. Archer-Daniels-Midland Company is the parent corporation of, or owns 10 percent or more of the stock of, the following other Petitioners: ADM/Growmark River Systems, Inc. and Valley Grain Products, Inc.

Sunbeam Corporation is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner The Coleman Company.

Colgate-Palmolive Company is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Hill's Pet Nutrition, Inc.

Standard Commercial Tobacco Co., Inc. is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: Standard Commercial Tobacco Company, Inc., Carolina Trading Corporation, James I. Miller Tobacco Co., Inc., PMA Incorporated, The Tobacco Trading Corporation, and W.A. Adams Company.

Honda Motor Corporation, Ltd. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner American Honda Motor Co., Inc.

Honda Trading Corporation and American Honda Motor Company, Inc. are the parent corporations of, or own 10 percent or more of the stock of, Petitioner Honda Trading America Corporation.

BP America & BP, PLC is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner BP Chemicals, Inc.

Harvest States Cooperative and Petitioner Cargill, Incorporated are the parent corporations of, or own 10 percent or more of the stock of, Petitioner Tacoma Export Marketing Company.

Petitioner Farmland Industries, Inc. has no parent corporation, and there is no publicly held company that owns 10 percent or more of its stock. Petitioner Farmland Industries, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, the following other Petitioners: Farmland Foods, Inc., Tradigrain, Inc., and Tradigrain, S.A., Geneva.

Petitioner Farmland Industries, Inc. and Hydro Agri Phosphates, Inc. are the parent corporations of, or own 10 percent or more of the stock of, Petitioner Farmland Hydro, L.P.

FMR Corp. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Lexmark International, Inc.

The Boeing Company is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner McDonnell Douglas Corporation.

Pharmacia Corporation is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Monsanto Company.

Caterpillar, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Solar Turbines Incorporated.

Imerys USA, Inc. and Imerys S.A. are the parent corporations of, or own 10 percent or more of the stock of, Petitioner ECC International, Inc.

Imerys Pigments, Inc., Imerys USA, Inc. and Imerys S.A. are the parent corporations of, or own 10 percent or more of the stock of, Petitioner ECCA Calcium Products, Inc.

Koch Industries, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, the following Petitioners: Koch Carbon, Inc. and Koch Refining Company.

Primex Technologies, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Physics International Company.

Sterling Chemicals Holdings, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner Sterling Chemicals, Inc.

IMC Global, Inc. is the parent corporation of, or owns 10 percent or more of the stock of, Petitioner IMC Global Operations, Inc.

Petitioner IMC Global Operations, Inc. and Phosphate Resources Limited Partnership are the parent corporations of, or own 10 percent or more of the stock of, Petitioner IMC-Agrico Company.

The following Petitioners have no parent corporations, and there is no publicly held company that owns 10 percent or more of their stock: General Electric Company, CBS Corporation, Continental Grain Company, ContiQuincy

Bunge, L.L.C., Olin Corporation, and International Multifoods Corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Harbor Maintenance Tax and the *United States Shoe* Test Case 2

B. The CIT's Refund Claim Procedure 3

C. Petitioners' Motions to Amend Their Judgments 4

D. The Federal Circuit's Designation of This Case and *United States Shoe II* As Companion Cases 5

E. The Federal Circuit's Ruling in *United States Shoe II* 5

F. The Federal Circuit's Reliance on *United States Shoe II* in the Ruling Denying Interest in This Case 6

REASONS FOR GRANTING THE PETITION 7

CONCLUSION 9

TABLE OF CONTENTS continued

Page

APPENDIX A *Hohenberg Bros. Company, et al., v. United States* (Fed. Cir. August 26, 2002) Decision 1a

APPENDIX B *United States Shoe Corporation v. United States and Hohenberg Bros. Company, et al., v. United States* (Fed. Cir. February 19, 2002) Order 12a

APPENDIX C *Hohenberg Bros. Company, et al., v. United States* (Ct. Int'l Trade December 28, 2000) Opinion 16a

APPENDIX D *BASF Corporation, et al., v. United States* (Ct. Int'l Trade January 4, 2001) Order 27a

APPENDIX E *Hohenberg Bros. Company, et al. v. United States* (Ct. Int'l Trade May 10, 2001) Order 31a

APPENDIX F *Hohenberg Bros. Company, et al. v. United States* (Fed. Cir. November 4, 2002) Order 38a

APPENDIX G 19 U.S.C. § 1505; 28 U.S.C. § 1581; 28 U.S.C. § 2644; U. S. CONST. art. I, § 9, cl.5; U.S. CONST. amend. V. 42a

APPENDIX H *Hohenberg Bros. Company, et al., v. United States,* February 25, 1999 Judgment 48a

TABLE OF CONTENTS continued

Page

APPENDIX I *United States Shoe Corporation v. United States* (Ct. Int'l Trade February 15, 1995) Order 56a

TABLE OF AUTHORITIES

CASES **Page**

IBM Corp. v. United States, 201 F.3d 1367 (Fed. Cir. 2000) 4

Swisher Int'l, Inc. v. United States, 205 F.3d 1358 (Fed. Cir. 2000) 4

United States Shoe Corp. v. United States, 114 F.3d 1564 (Fed. Cir. 1997) 3

United States Shoe Corp. v. United States, 296 F.3d 1378 (Fed. Cir. 2002) 1, 5, 6

United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995) 2, 3

United States v. United States Shoe Corp., 523 U.S. 360 (1998) 3

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 9, cl.5 2

STATUTES, REGULATIONS AND RULES

26 U.S.C. § 4461 2

26 U.S.C. § 4462 2

28 U.S.C. § 2644 ..... 2, 4, 6

67 Fed. Reg. 31,948 (2002) 6

TABLE OF AUTHORITIES continued

Page

U.S. CIT R. 3(a)(1) 6

U.S. CIT R. 84(b) 2

PETITION FOR A WRIT OF CERTIORARI

This case presents the question whether Petitioners are entitled to interest on Harbor Maintenance Tax refunds required by this Court's ruling, in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), that the tax is unconstitutional when assessed on exports. On remand in *United States Shoe,* the U.S. Court of Appeals for the Federal Circuit recently addressed the same question and denied the taxpayer's interest claim. *See United States Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002) (hereinafter "*United States Shoe II*"). A petition for a writ of certiorari was filed in *United States Shoe II* on February 19, 2003. Because *United States Shoe II* is the lead case on Harbor Maintenance Tax interest issues, Petitioners respectfully request the Court to hold this petition pending disposition of *United States Shoe II* and then grant this petition, vacate the Federal Circuit's judgment in this case, and remand this case to the Federal Circuit for further proceedings consistent with *United States Shoe II.*

OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-11a) is reported at 301 F.3d 1299. The opinions of the U.S. Court of International Trade (Pet. App. 16a-37a) are not reported.

JURISDICTION

The Federal Circuit's final judgment was entered on August 26, 2002. (Pet. App. 3a.) Petitioners filed a timely petition for rehearing *en banc* on October 9, 2002, which the Federal Circuit denied on November 4, 2002. (*Id.* at 38a-41a.) On January 16, 2003, the Chief Justice granted an application for extension of time to file this petition on or before March 4, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Appendix (Pet. App. 42a-47a) sets forth verbatim the following statutory and constitutional provisions: 19 U.S.C. § 1505; 28 U.S.C. §§ 1581(a) and 2644; U.S. CONST. art. I, § 9, cl.5; and U.S. CONST. amend. V.

STATEMENT OF THE CASE

A. The Harbor Maintenance Tax and the *United States Shoe* Test Case

In 1986, Congress enacted the Harbor Maintenance Tax ("HMT") as a means of raising revenues to fund the development and maintenance of the nation's harbors. In pertinent part, the tax was paid by exporters that shipped commercial cargo from coastal ports in the mainland United States. The amount of tax owing was a fixed percentage of the value of the export cargo. *See* 26 U.S.C. §§ 4461-62. The U.S. Customs Service administered and enforced the HMT statute.

Beginning in the mid-1990s, thousands of exporters, including the Petitioners in this case, filed separate civil actions in the United States Court of International Trade ("CIT"), challenging the tax on the ground that it violated the Export Clause of the U.S. Constitution, which provides that "[n]o Tax or Duty shall be laid on articles exported from any State." U.S. CONST. art. I, § 9, cl.5. The remedies requested in these suits included refunds of taxes previously paid, plus interest.

The CIT chose one of these numerous similarly situated cases as a "test case" that would "proceed first to final determination to serve as a test of the right of recovery in the other actions." U.S. CIT R. 84(b) (defining test case). That case was *United States Shoe Corp. v. United States*, 907 F.

Supp. 408 (Ct. Int'l Trade 1995). Under its test case procedure, the CIT stayed all other export HMT cases, including those filed by Petitioners, pending a decision in *United States Shoe*. (*See* Pet. App. 56a-73a.)

Sitting as a three-judge court in *United States Shoe*, the CIT held that the HMT was an unconstitutional tax on exports. *United States Shoe*, 907 F. Supp. 408. The government appealed the CIT's ruling to the Federal Circuit. Sitting as a five-judge panel, the Federal Circuit affirmed. *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997). The government then filed a petition for a writ of certiorari seeking review of the Federal Circuit's ruling in this Court. This Court granted the petition and unanimously affirmed. *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998). This Court's decision in *United States Shoe* conclusively determined that Congress violated the constitutional rights of Petitioners and other taxpayers by exacting the tax monies at issue.

B. The CIT's Refund Claim Procedure

This Court's decision in *United States Shoe* required the CIT to refund hundreds of millions of dollars in tax money to thousands of taxpayers. The CIT adopted a procedure that utilized a standard form stipulated judgment to implement the refunds in pending HMT court cases. The form judgment ordered the government to pay the taxpayer a refund of a principal amount stipulated by the parties. The form judgment did not, however, require the government to pay interest at that time. Under the terms of the form judgment, determination of entitlement to interest was deferred pending resolution of *IBM Corp. v. United States*, a separate test case that addressed entitlement to interest. (*See* Pet. App. 49a.)

Petitioners followed the claims procedure required by the CIT, entering into the stipulated judgments that ordered the government to refund principal but deferred resolving the question of interest. (*See, e.g.*, Pet. App. 48a-55a.) The government subsequently paid Petitioners the refunds of principal in the amounts stipulated, without interest.

C. Petitioners' Motions to Amend Their Judgments

After Petitioners had signed their stipulated judgments and received their refunds of tax principal, the Federal Circuit decided two HMT cases that fundamentally affected their interest rights. The first was *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000), which established the legal premise for Petitioners' entitlement to interest under two statutes – 28 U.S.C. § 2644 and 19 U.S.C. § 1505. The second was *IBM Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), which was the interest case referred to in Petitioners' stipulated judgments. The Federal Circuit's *IBM* decision supported Petitioner's entitlement to interest under 28 U.S.C. § 2644 but did not address additional entitlements to interest that Petitioners believed they had under the Takings Clause of the Fifth Amendment and the Export Clause of Article I.

Following the Federal Circuit's decisions in *Swisher* and *IBM,* Petitioners moved to amend their judgments to provide expressly for interest under 19 U.S.C. § 1505, 28 U.S.C. § 2644, the Takings Clause, and the Export Clause. Petitioners argued, *inter alia,* that the intervening Federal Circuit decisions justified amendment of their judgments, and

that interest was required as a matter of law. The CIT denied the motions to amend.[1]

D. The Federal Circuit's Designation of This Case and *United States Shoe II* As Companion Cases

Petitioners appealed to the Federal Circuit. At the government's request, the Federal Circuit designated this case and *United States Shoe II* as "companion cases." (Pet. App. 14a; *see also supra* at 1 (describing *United States Shoe II*).) Like the present case, *United States Shoe II* specifically addresses the question whether the government owes interest under 19 U.S.C. § 1505, the Takings Clause, and the Export Clause. Because the issues in this case substantially overlap with those in *United States Shoe II,* the Federal Circuit held argument in both cases on the same day, and before the same panel. (Pet. App. 14a.)

E. The Federal Circuit's Ruling in *United States Shoe II*

The Federal Circuit issued its decision in *United States Shoe II* while the appeal in the present case was still pending. Among other things, the court held that no interest was owing under 19 U.S.C. § 1505, the Takings Clause, or the Export Clause. *United States Shoe II*, 296 F.3d at 1382-85.[2]

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[1] All of the Petitioners moved to amend their judgments after they were final, and many of the Petitioners filed additional, earlier, motions to amend their judgments at the time they were interlocutory. The CIT issued orders denying both types of motions. (Pet. App. 16a-37a.)

[2] The Federal Circuit also denied interest under 28 U.S.C. § 2644 in *United States Shoe II*, because section 2644 only

(Footnote cont'd on next page)

F. The Federal Circuit's Reliance on *United States Shoe II* in the Ruling Denying Interest in This Case

The Federal Circuit then issued its decision in the present case, which denied Petitioners' interest claims. The Federal Circuit's opinion focused primarily upon 28 U.S.C. § 2644. The court held that no interest was owing, because section 2644 only requires interest if the CIT has jurisdiction under 28 U.S.C. § 1581(a), and Petitioners' stipulated judgments stated that the CIT had jurisdiction instead under 28 U.S.C. § 1581(i). (Pet. App. 10a.)

The panel then reached the other statutory and constitutional issues presented. The panel denied interest under 19 U.S.C. § 1505, the Takings Clause and the Export

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(Footnote cont'd from previous page.)

requires interest if the CIT has jurisdiction under 28 U.S.C. § 1581(a), and the CIT had jurisdiction in that case instead under 28 U.S.C. § 1581(i). *United States Shoe II*, 296 F.3d at 1382. Section 2644 also provides no interest remedy for the thousands of other taxpayers who have filed administrative claims for HMT refunds pursuant to a procedure that Customs adopted in 2001. *See* 67 Fed. Reg. 31,948 (2002). Those claims will be resolved administratively by Customs, not by the CIT, and section 2644 only requires payment of interest if a civil action is initiated in the CIT through the filing of a summons. 28 U.S.C. § 2644; *see also* U.S. CIT R. 3(a)(1) (describing initation of civil action through filing of summons). In addition, even in the limited number of court cases in which section 2644 applies, that statute only provides for partial interest, running from the date of the summons forward, and does not require interest from the date Customs receives payment to the date of the summons. *See* 28 U.S.C. § 2644.

Clause, relying exclusively on the grounds stated in *United States Shoe II*:

> As to Hohenberg's alternative arguments that it is entitled to interest on HMT refunds under 19 U.S.C. § 1505, the Export Clause, and the Takings Clause, this court has recently held in *United States Shoe Corp. v. United States*, No. 98-1574 (Fed. Cir. July 23, 2002), that neither the Constitution nor any statute mandates the payment of interest. Accordingly, these provisions do not give Hohenberg any entitlement to pre-summons interest on HMT refunds.

(Pet. App. 10a-11a.)

The Federal Circuit denied rehearing *en banc* (Pet. App. 39a-41a), and this petition followed.

REASONS FOR GRANTING THE PETITION

The Court should hold this petition pending disposition of *United States Shoe II* and then grant this petition, vacate the Federal Circuit's judgment in this case, and remand this case to the Federal Circuit for further proceedings consistent with *United States Shoe II*. That course of action is warranted because this case raises many of the same issues as *United States Shoe II*, and Petitioners accordingly are among the thousands of HMT taxpayers that would be directly affected by a decision of this Court in *United States Shoe II*.

The Federal Circuit recognized the substantial overlap between this case and *United States Shoe II* by designating the cases as "companion cases" and granting the government's request to hear oral argument in both appeals on the same date, and before the same panel. (Pet. App. 12a-15a.) In this case, there are three specific questions of substantial importance that are identical to questions

presented in the pending petition for a writ of certiorari in *United States Shoe II*. *See* Petition for a Writ of Certiorari, *United States Shoe Corp. v. United States* (filed February 19, 2003) (hereinafter "*U.S. Shoe II* Pet."). *First*, both cases address whether 19 U.S.C. § 1505 requires the government to pay interest on export HMT refunds. The Federal Circuit's prior ruling in *United States Shoe II* was the court's sole justification for denying Petitioners' rights to section 1505 interest in this case. (Pet. App. 10a-11a (citing *United States Shoe II*).) The petition for a writ of certiorari in *United States Shoe II* explains why the Federal Circuit's misapplication of section 1505 justifies this Court's intervention. *See United States Shoe II* Pet. at 2, 10, 14-18.

Second, both cases present the question whether the Export Clause of Article I requires the government to pay interest on export HMT refunds. The Federal Circuit denied Petitioners' rights to interest under the Export Clause based solely on the court's ruling in *United States Shoe II*. (Pet. App. 11a (citing *United States Shoe II*).) The petition for a writ of certiorari in *United States Shoe II* demonstrates that although it is unnecessary to reach the constitutional question, the Export Clause requires payment of interest, and the Federal Circuit's contrary conclusion demands this Court's review. *See United States Shoe II* Pet. at 3, 11, 20-23.

Third, both cases address whether the Takings Clause of the Fifth Amendment requires the government to pay interest on export HMT refunds. The Federal Circuit again relied on its opinion in *United States Shoe II* to deny Petitioners' claims. (Pet. App. 11a (citing *United States Shoe II*).) The petition for a writ of certiorari in *United States Shoe II* argues that in the context of the HMT litigation, constitutional entitlements to interest include a right to interest under the Takings Clause, and that this Court should review the Federal

Circuit's erroneous ruling nullifying that right. *See United States Shoe II* Pet. at 4, 11, 25-26.

CONCLUSION

Because of the substantial overlap between this case and *United States Shoe II*, the Court should hold this petition pending disposition of *United States Shoe II* and then grant this petition, vacate the Federal Circuit's judgment in this case, and remand this case to the Federal Circuit for further proceedings consistent with *United States Shoe II*.

Respectfully submitted,

PETER BUCK FELLER
Counsel of Record
DANIEL G. JARCHO
JOSEPH F. DENNIN

MCKENNA LONG &
ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioners

February 28, 2003